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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

In re:

ERICKSEN, ARBUTHNOT, KILDUFF, DAY
& LINDSTROM, INC., a California
corporation,

Debtor.

Tax I.D. No. 94-2271850

Case No.: 23-40134

Chapter 11 Case

**MOTION FOR AUTHORITY TO (A)
PAY PREPETITION WAGES,
BENEFITS, AND EMPLOYEE
BUSINESS EXPENSES; AND (B)
CONTINUE THE POSTPETITION
MAINTENANCE OF EMPLOYEE
BENEFIT PROGRAMS, POLICIES, AND
PROCEDURES IN THE ORDINARY
COURSE**

[Hearing Requested on Shortened Notice]

Date:

Time:

Place:

1 Ericksen, Arbuthnot, Kilduff, Day & Lindstrom, Inc. (“**Ericksen**” or the “**Debtor**”), as
2 debtor and debtor in possession in the above-captioned chapter 11 case (the “**Chapter 11 Case**”)
3 requests entry of an order, pursuant to Sections 105(a), 363(b), and 507 of title 11 of the United
4 States Code, 11 U.S.C. §§ 101, *et seq.* (the “**Bankruptcy Code**”), and Rules 6003 and 6004 of the
5 Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), authorizing, but not directing,
6 the Debtor to (a) pay, among other things, prepetition wages, salaries, employee benefits, and
7 reimbursable expenses (the “**Prepetition Employee Obligations**”); (b) continue the post-petition
8 maintenance of any employee benefit programs, policies, and procedures in the ordinary course in
9 accordance with the Debtor’s prepetition practices as such were in effect as of the date hereof and
10 as such may be modified, amended, or supplemented from time to time in the ordinary course of
11 the Debtor’s business; and (c) honor and pay any related administrative fees, costs, expenses, and
12 obligations arising thereunder. Further, the Debtor requests that the Court authorize and direct all
13 applicable banks and financial institutions (“**Banks**”) to receive, process, honor, and pay all checks
14 issued or to be issued and electronic funds transfers requested or to be requested relating to the
15 Prepetition Employee Obligations.

16 In support of the Motion, the Debtor relies on the *Declaration of Kyle Everett in Support of*
17 *Chapter 11 Petitions and First Day Motions* (the “**Everett Declaration**”), which is being filed
18 contemporaneously with this Motion and incorporated herein by reference. A proposed form of
19 order granting the relief requested is attached as **Exhibit A** (the “**Proposed Order**”).
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MEMORANDUM OF POINTS AND AUTHORITIES

I. JURISDICTION

This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334 and Rule 5011-1(a) of the Bankruptcy Local Rules for the United States District Court for the Northern District of California (the “**Bankruptcy Local Rules**”). This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

II. BACKGROUND

On February 3, 2023 (the “**Petition Date**”), the Debtor filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code—thereby commencing the above-captioned Chapter 11 Case. The Debtor continues to operate their business as a debtor in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in this Chapter 11 Case. A discussion of the facts and circumstances surrounding the Chapter 11 Case and underlying relief requested herein is set forth in the Everett Declaration, which is incorporated herein by reference.

III. RELIEF REQUESTED

By this Motion, pursuant to Sections 105(a), 363(b), and 507 of the Bankruptcy Code and Rules 6003 and 6004 of the Bankruptcy Rules, the Debtor requests entry of an order authorizing, but not directing, the Debtor to (a) pay the Prepetition Employee Obligations; (b) continue the post-petition maintenance of any employee benefit programs, policies, and procedures in the ordinary course in accordance with the Debtor’s prepetition practices as such were in effect as of the date hereof and as such may be modified, amended, or supplemented from time to time in the ordinary course of the Debtor’s business; and (c) honor and pay any related administrative fees, costs, expenses, and obligations arising thereunder. Further, the Debtor requests that the Court authorize and direct all applicable Banks to receive, process, honor, and pay all checks issued or to be issued and electronic funds transfers requested or to be requested relating to the Prepetition Employee Obligations.

1 **IV. DEBTOR’S PREPETITION EMPLOYEE OBLIGATIONS**

2 As of the Petition Date, the Debtor employs eight people (the “**Employees**”) that perform a
3 wide variety of services for the Debtor, including managing the Debtor’s day-to-day operations,
4 billing, receivable collections, file transfers, information technology, accounting, human resources,
5 and similar business operation functions. The Employees’ skills and knowledge of the Debtor’s
6 operations are essential to the orderly winddown of the Debtor’s business and liquidation of the
7 assets of the bankruptcy estate. The Employees continue to assist the Debtor in collection of
8 substantial amounts owed from clients and will be instrumental in reviewing and analyzing other
9 potential recoveries on behalf of the Debtor. The Employees will also be assisting counsel in review
10 of claims against the Debtor. Without the Employees’ continued and uninterrupted services, it
11 would be difficult to truly maximize the value of the Debtor’s estate and an orderly liquidation of
12 the Debtor would be impossible. A chart describing the approximate amount to be paid to each
13 Employee for the next payroll and the accrued vacation and sick hours is attached as **Exhibit B** to
14 the Everett Declaration and is incorporated herein by reference.

15 In the ordinary course of business, the Debtor incurs and pays obligations relating to the
16 Employees’ salaries (the “**Wages**”). The Employees work for the Debtor on both a salaried and
17 hourly basis. The Debtor pays the Employees semimonthly (i.e. 24 pay periods per year). The
18 Debtor’s payroll payment due on January 31, 2023 (the “**January 31 Payroll**”) was paid in the
19 estimated amount of \$35,139.20 and was for the period from January 15, 2023 – January 31, 2023.
20 The Debtor estimates \$240 in payroll obligations for the January 31 Payroll were not included in
21 January 31 Payroll payment; accordingly, the Debtor proposes to include such amount in the next
22 pay period, subject to approval of the Court. The Debtor’s next payroll is due on February 15, 2023
23 (the “**February 15 Payroll**”), and the Debtor believes it will be in a similar amount to or slightly
24 less than the January 31 Payroll. Only a small percentage of the February 15, 2023, payroll will be
25 for wages and associated taxes for the pre-petition period (i.e. February 1-February 3, 2023, in the
26 approximate amount of \$7,150). No Employee is owed or will be paid prepetition Wages in an
27 amount exceeding the \$13,650 cap imposed by Section 507(a)(4) of the Bankruptcy Code.

1 The Debtor routinely withholds from payroll certain amounts that the Debtor is required to
2 transmit to third parties for such purposes as Social Security; Medicare; federal, state, and local
3 taxes; taxes imposed by law; and payroll deduction payment programs for child support,
4 garnishment, and other similar orders (the “**Withholding Obligations**”). The Debtor believes that
5 such withheld funds, to the extent that they were in the Debtor’s possession as of the Petition Date,
6 or remain in the Debtor’s possession, are not property of the Debtor’s bankruptcy estates under
7 Section 541(d) of the Bankruptcy Code. The Debtor is also required to make certain additional
8 payments from their own funds in connection with certain of the Withholding Obligations, which
9 include, for example, matching payments on account of Social Security and Medicare taxes (the
10 “**Employer Payroll Taxes**”). The Debtor seeks authority to satisfy all such prepetition Employer
11 Payroll Taxes and Withholding Obligations.

12 The Debtor maintains a qualified defined contribution plan that meets the requirements of
13 section 401(a) and 401(k) of the Internal Revenue Code (the “**Retirement Plan**”) for the benefit of
14 the Employees. The Retirement Plan is funded partially through withholdings from participating
15 Employees’ wages and salaries. Additionally, the Debtor matches certain of the participating
16 Employees’ 401(k) contributions. For the February 15 Payroll, the Debtor anticipates
17 approximately \$700.00 in 401(k) contributions.¹ The Debtor anticipates that a portion of the
18 Retirement Plan obligations accrued prepetition and seek authority to honor all prepetition
19 obligations under the Retirement Plan in the ordinary course of business.

20 In addition to the February 15 Payroll, the Debtor offers several health and welfare benefit
21 plans for their Employees including coverage for medical, prescription, dental, vision, life, and
22 disability (collectively, the “**Health and Welfare Plan Obligations**”). The Debtor anticipates there
23 will be a minimal amount owed for Health and Welfare Plan Obligations that are attributable to a
24 pre-petition period (i.e. February 1-3, 2023). Future Health and Welfare Plan Obligations will be
25 paid in the ordinary course of business.

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27 ¹ The Debtor notes that there may be additional employer contributions owed arising from the Retirement Plan. If
28 contributions are owed, the Debtor will seek separate authority to the extent that the contributions are outside of the
ordinary course of business.

1 In addition, the Debtor customarily reimburse Employees who incur business expenses in
2 the ordinary course of performing their business duties on behalf of the Debtor. These
3 reimbursement obligations include business related expenses such as travel, meals, lodging, and
4 supplies for business use (collectively, the “**Reimbursement Obligations**”). Because Employees
5 incur Reimbursement Obligations on an ongoing basis, it is difficult to determine how much is
6 owed by the Debtor at any given time. As of the filing of this Motion, the Debtor anticipates
7 Reimbursement Obligations for the prepetition period to be less than \$1,000 in the aggregate and
8 seeks authority to satisfy all prepetition Reimbursement Obligations as and when they arise in the
9 ordinary course of business.²

10 The Debtor generally allow employees to accrue paid time off based on the Employees’
11 tenure with the Debtor (“**PTO Policy**”). For example, Employees who have worked with the Debtor
12 accrue anywhere from 6.66 to 16.64 hours on a monthly basis. The Debtor has compensated all
13 outstanding PTO Policy hours accumulated by the Employees through December 31, 2022. The
14 Debtor seeks to continue their prepetition PTO Policy and honor any outstanding obligations with
15 respect to their PTO Policy in the ordinary course of business.

16 The Debtor’s most significant Prepetition Employee Obligations are outlined above.
17 However, for the avoidance of doubt, the Prepetition Employee Obligations may include other
18 employee programs, policies, or procedures historically maintained by the Debtor and the
19 associated obligations, and by this Motion, the Debtor seeks authorization, but not a requirement,
20 to satisfy such obligations in the ordinary course of business.

21 The Debtor further requests that the Court authorize the Debtor’s Banks to receive, process,
22 honor, and pay all prepetition and post-petition checks issued or to be issued, and funds transfers
23 requested, or to be requested, by the Debtor for the Prepetition Employee Obligations. The Debtor
24 also seeks authority to issue new post-petition checks, or effect new fund transfers, for Prepetition
25 Employee Obligations to replace any prepetition checks or fund transfers that may be dishonored

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27 ² The Debtor believes that the outstanding Reimbursement Obligations is less than \$1,000 and provides this figure as
28 an estimate.

1 or rejected and to reimburse the Employees or the applicable payee for any fees or costs incurred
2 by them in connection with a dishonored or voided check or funds transfer.

3 **V. BASIS FOR RELIEF REQUESTED**

4 By this Motion, the Debtor seeks authority to pay Prepetition Employee Obligations.
5 Section 363(b) of the Bankruptcy Code expressly authorizes the court to approve the trustee's use
6 of property outside the ordinary course of business, and courts regularly grant first day relief
7 allowing debtors to pay prepetition employee wages and benefits in chapter 11 cases because an
8 employee exodus, or even significant damage to morale, can harm a reorganization. *See, e.g.,*
9 *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (noting that courts have approved
10 distributions that are not consistent with ordinary priority rules in instances where significant Code-
11 related objectives, such as enabling a successful reorganization, would be served and listing
12 examples such as "first-day wage orders that allow payment of employees' prepetition wages...");
13 *In re Montgomery-Sansome, LP*, Case No. 17-30515-HLB (Bankr. N.D. Cal. Sept. 20, 2017)
14 (approving motion for authority to pay, among other things, prepetition claims related to employee
15 wages).

16 If the Debtor is not permitted to pay the Prepetition Employee Obligations to its Employees
17 in the ordinary course of business, Employees will not receive full payment for services already
18 performed. Such a result would seriously undermine the morale and loyalty of the Employees and,
19 as a result, the Chapter 11 Case would be substantially jeopardized. To maintain the continuity of
20 the Debtor's business and to preserve the morale of its small, continuing workforce and effective
21 winddown and liquidation, it is essential that the Debtor be permitted to pay the Prepetition
22 Employee Obligations. Further, the payment of the Prepetition Employee Obligations would not
23 detriment other creditors in the Chapter 11 Case, as the payment of such claims are entitled to
24 priority payment and the amounts of the proposed payments (per Employee) are less than the
25 maximum permitted claims under Section 507(a)(4) of the Bankruptcy Code.

26 The Debtor believes it is in the best interest of creditors for the requested Prepetition
27 Employee Obligations to be maintained and satisfied.

1 **VI. REQUEST FOR EXPEDITED RELIEF**

2 The Debtor respectfully requests emergency consideration of this Motion pursuant to
3 Bankruptcy Rule 6003, which empowers a court to grant relief within the first 21 days after the
4 commencement of a chapter 11 case “to the extent that relief is necessary to avoid immediate and
5 irreparable harm.” Specifically, the Debtor submits that its estate could be immediately and
6 irreparably harmed if it is unable to satisfy its Prepetition Employee Obligations. The Debtor’s
7 failure to pay such amounts could undermine the morale and loyalty of the Employees and lead to
8 an employee exodus at a time when the Debtor needs the remaining Employees. Accordingly, the
9 Debtor submits that it has satisfied the “immediate and irreparable harm” standard of Bankruptcy
10 Rule 6003 and requests that the Court approve the relief requested in this Motion on an emergency
11 basis. In an abundance of caution, the Debtor also respectfully requests that the Court waive the
12 fourteen-day stay imposed by Bankruptcy Rule 6004(h) to the extent applicable here, as the exigent
13 nature of the relief sought herein justifies immediate relief.

14 **VII. NOTICE**

15 Notice of this Motion, whether by facsimile, electronic mail, or U.S. mail, will be given to
16 the following parties: (a) the United States Trustee for the Northern District of California; (b) all
17 secured creditors; (c) the twenty largest unsecured creditors for the Debtor; (d) the Debtor’s
18 identified, interested taxing authorities, including the Internal Revenue Service; (e) the State Bar
19 of California; (f) the landlords that are parties to office space leases with the Debtor; and (g) any
20 party that has requested notice pursuant to Bankruptcy Rule 2002. The method of service for each
21 party will be described more fully in the certificate of service prepared by BMC. The Debtor
22 respectfully submits that, under the circumstances, such notice is sufficient, and that no other or
23 further notice of this Motion is required.

24 WHEREFORE, the Debtor respectfully requests entry of the Proposed Order granting the
25 relief requested herein and for all other relief that is appropriate under the circumstances.

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Dated: February 3, 2023

Respectfully submitted,

BAKER & HOSTETLER LLP

By: /s/ Michael T. Delaney
Michael T. Delaney

Proposed Attorneys for Debtor